No. 06-524

In The
Supreme Court of the United States

ALBERTA A. SWAN,

Petitioner,

v.

WAL-MART,

Respondent.

On Petition For A Writ Of Certiorari To The Commonwealth Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Petitioner Alberta Swan's Petition for Writ of Certiorari raises only questions of state law, such that this Court lacks jurisdiction over her claim pursuant to 28 U.S.C. § 1257, must her Petition be denied?

2. Where her Petition presents no compelling reason(s) for granting the writ of certiorari, should Petitioner Alberta Swan's Petition for Writ of Certiorari be denied?

3. Where the Pennsylvania courts correctly affirmed the denial of Petitioners' claim for workers' compensation benefits under Pennsylvania state law based on well-supported findings of fact, should Petitioner Alberta Swan's Petition for Writ of Certiorari be denied?

CORPORATE DISCLOSURE STATEMENT

Although Petitioner has listed "Wal-Mart" as the respondent, there is no legal entity by that name. The named party in the state proceedings below was "Wal-Mart Store #2334." Wal-Mart Store #2334 is operated by Wal-Mart Stores East, L.P., an indirect wholly-owned subsidiary of Wal-Mart Stores, Inc. Title to the real estate upon which Wal-Mart Store #2334 is located is held by Wal-Mart Stores, Inc. Wal-Mart Stores, Inc. is a publicly held corporation whose shares of common stock are listed on the New York Stock Exchange. Wal-Mart Stores, Inc. has no parent and no publicly held company owns 10% or more of its stock.

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CITATIONS OF OPINIONS AND ORDERS

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), No. 718 MAL 2005, Order (Pa. June 1, 2006) (per curiam) (Petitioner's Appendix A).

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), No. 718 MAL 2005, 587 Pa. 718, 898 A.2d 1074 (Table) (May 1, 2006) (per curiam) (Petitioner's Appendix B).

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), slip op., No. 584 C.D. 2005 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix).

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), slip op., No. A04-0448 (Pa. Workers' Compensation Appeal Board, Harrisburg, Jan. 26, 2005) (Petitioner's Appendix C).

Alberta A. Swan v. Wal-Mart #2334, slip op., No. 2340253 (Pa. Dept. of Labor and Industry, Bureau of Workers' Compensation) (January 27, 2004) (Benischeck, J.) (Petitioner's Appendix D).

COUNTERSTATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed, the Supreme Court of Pennsylvania's denial of Ms. Swan's Petition for Allowance of Appeal, was entered on May 6, 2006. Petitioner's Application for Reconsideration in the Supreme

Court of Pennsylvania was denied by order dated June 6, 2006. Ms. Swan filed a timely *pro se* Petition for Writ of Certiorari with this Court on August 19, 2006, which, following the filing of her Supplemental Appendix, was placed on this Court's docket on October 18, 2006.

In her Petition, Ms. Swan does not challenge the constitutionality of any federal or state statute, so the notification requirements of Supreme Court Rules 29.4(b) and (c) are not invoked.

Petitioner properly invokes 28 U.S.C. § 1254 as the basis for this Court's jurisdiction to *consider* her Petition for a Writ of Certiorari. However, this Court does not have jurisdiction to *decide* any claim or question raised in Ms. Swan's Petition because the Petition does not raise any federal question as set forth in 28 U.S.C. § 1257(a). Rather, the Petition raises only questions of state law, which this Court, respectfully, lacks jurisdiction to decide.

COUNTERSTATEMENT OF THE CASE

This is a simple state workers' compensation case, raising no federal questions.

On March 3, 2003, Petitioner filed an amended claim petition pursuant to the Pennsylvania Workers' Compensation Act seeking total disability benefits for an incident that occurred on September 18, 2001 in the course and scope of her employment with Wal-Mart. She claimed that, as she was working as a clerk in the cash room of a Wal-Mart store, someone began to knock and "holler" outside the locked door of the cash room demanding to be let in. She became alarmed and called a manager. When the

manager did not respond, she called her husband (who was working in the store) and then called 911, reporting a robbery in progress. The police, her husband, and a store manager arrived shortly thereafter.

The man at the door was, in fact, a loss prevention officer employed by Wal-Mart named Michael Schmidt. Earlier in the evening, Mr. Schmidt and other loss prevention officers were introduced to Petitioner and told her that they would be working in and around the office all evening installing new security cameras. At approximately 2:00 a.m., Mr. Schmidt went to work on the cameras in the cash room. He knocked on the door, announced himself as "Mike from Loss Prevention" and looked up into the camera so that Petitioner could see who he was. Mr. Schmidt never threatened Petitioner in any way when he approached the door.

In her workers' compensation claim, Petitioner claimed that she was physically and psychologically disabled by this incident. Ms. Swan at no point in the workers' compensation proceedings asserted any federal claim. Following a full evidentiary hearing before Pennsylvania Workers' Compensation Judge (WCJ) Robert Benischeck, Judge Benischeck, in a Decision and Order circulated on January 27, 2004 (Petitioner's Appendix D), found that Petitioner failed to sustain her burden in demonstrating she suffered an injury while in the course and scope of her employment. Specifically, the WCJ found that Ms. Swan failed to establish she was exposed to abnormal working conditions which resulted in a psychiatric injury. Additionally, the WCJ found that there was no evidence she suffered any disability as a result of any psychiatric injury. Finally, the WCJ determined Petitioner

failed to carry her burden of proof that she suffered any physical injury or aggravation of a physical injury as a result of any workplace incident.

On February 14, 2004, Petitioner filed an Appeal with the Pennsylvania Workers' Compensation Appeal Board ("the Board"). On January 26, 2005, the Board affirmed Judge Benischek's decision (Petitioner's Appendix C), concluding that the decision was supported by substantial, competent evidence and that the Petitioner presented no evidence she sustained any physical injury. The Board agreed Petitioner was not subjected to abnormal working conditions, noting that the WCJ did not believe Petitioner's version of events.

On February 9, 2005, Petitioner filed a Petition for Review with the Commonwealth Court of Pennsylvania. The Commonwealth Court filed an unreported Memorandum Opinion, *Alberta A. Swan v. Workers' Compensation Appeal Bd. (Wal-Mart #2334 and A.I.G. Claim Services, Inc.)*, slip op., No. 584 C.D. 2005 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix) affirming the determinations of the workers' compensation judge and the Board.

On August 27, 2005, Petitioner petitioned the Supreme Court of Pennsylvania for allowance of appeal of the decision of the Commonwealth Court. The Pennsylvania Supreme Court denied leave to appeal by order dated May 6, 2006 (Petitioner's Appendix B) and, by order dated June 6, 2006, denied Petitioner's Application for Reconsideration (Petitioner's Appendix A).

SUMMARY OF ARGUMENT

Respectfully, this Court lacks jurisdiction to review the issues raised in Ms. Swan's Petition for Writ of Certiorari. Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review by writ of certiorari decisions of the highest court of a state that calls into question a federal law or treaty, calls into question the validity of a state law as being "repugnant to" the Constitution or federal law, or sets up or claims any federal or Constitutional claim or right. The Supreme Court of Pennsylvania's decision here does none of those things. Rather, the court simply denied discretionary review of an intermediate appellate court's affirmance of the denial of Petitioner's claim for workers' compensation benefits under Pennsylvania state law. Other than oblique references to the Americans with Disabilities Act (pursuant to which Petitioner brought no claim), Petitioner raises no federal question in her present Petition, and previously raised no federal issues or claims in the state courts. Moreover, the state courts decided no federal issues.

Even if this Court had jurisdiction to review Petitioner's claims, certiorari should nevertheless be denied. Ms. Swan's Petition raises no "compelling reasons" for this Court's review. Sup. Ct. R. 10. Instead, the asserted error consists of purported erroneous factual findings and the purported misapplication of Pennsylvania law in a case brought exclusively under the Pennsylvania Workers' Compensation Act. This is not a proper basis for this Court's assertion of jurisdiction or review pursuant to a writ of certiorari. *Id.* Moreover, the Petition raises issues of interest only to the parties; no issues of public importance are raised.

Finally, it is clear that Petitioner's state workers' compensation claim was correctly decided on its merits. The workers' compensation judge properly found that, based on express credibility determinations and findings of fact, Petitioner failed to prove required elements of her claim. These findings of fact were accepted by the Pennsylvania Commonwealth Court as being supported by the record, and were not disturbed by the Supreme Court of Pennsylvania. With two Pennsylvania appellate courts accepting the findings of fact by the workers' compensation judge, Petitioner offers no reason why this Court should disturb those findings or the Pennsylvania courts' denial of her workers' compensation claim.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S PURELY STATE LAW CLAIMS.

This Court's jurisdiction to review decisions of the highest court of a state pursuant to a writ of certiorari is defined and limited by 28 U.S.C. § 1257 which reads, in pertinent part, as follows:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or

> claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). Pursuant to this statute, this Court lacks jurisdiction over final judgments of state courts that do not raise a federal question. *See also Ellis v. Dixon*, 349 U.S. 458, 459 (1955) (if state court's decision rested on nonfederal ground, Supreme Court "must decline to take jurisdiction"); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950) (if decision "may be supportable as a matter of State law," [it is] not subject to review by this Court. . . .").

In the present case, Petitioner does not "draw into question" the validity of any federal or state law on any ground. Therefore, the first two possible bases for this Court's jurisdiction as set forth in section 1257 are not applicable.

The third basis for jurisdiction in section 1257 also is not applicable, because the Petition does not "set up or claim[]" any federal right. It is clear that, despite a single oblique reference to the Americans with Disabilities Act in her "Questions Presented" (Petition, 2)[1], and elsewhere in

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[1] The pages of Ms. Swan's *pro se* Petition are not numbered, so citations to the Petition assume that it is numbered consecutively, with the cover being page 1. Thus, for example, Petitioner's "Questions Presented" section appears on page 2.

Notably, Ms. Swan's Petition does not comply with Supreme Court Rule 14(g)(1), which requires a petitioner seeking review of a state court judgment to note with specificity where the federal question(s) for which review is sought were raised at each stage of the state court proceedings, "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

her Petition (Petition, 7, 11), Ms. Swan does not *assert* any claim under the ADA, but instead seeks review only of the denial of her claim for workers' compensation under the Pennsylvania Workers' Compensation Act. Nor could she properly assert an ADA claim in her Petition, because at no point in the state court proceedings did Petitioner *bring* a discrimination claim under the ADA; instead, she proceeded *exclusively* pursuant to the Pennsylvania Workers' Compensation Act.[2] Furthermore, it is clear that neither

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[2] Indeed, to properly assert a claim under the ADA, Petitioner would have had to first present such a claim to the federal Equal Employment Opportunity Commission or its Pennsylvania equivalent, the Pennsylvania Human Relations Commission (PHRC). *See Churchill v. Star Enterprises*, 183 F.3d 184, 190 (3d Cir. 1999) (plaintiff bringing claim under ADA or its Pennsylvania equivalent is required to exhaust administrative remedies with EEOC and PHRC before filing suit). She did not do so. She also would have been required to assert that despite her asserted disability, she was otherwise able to perform the essential functions of her employment with reasonable accommodation. *See Imler v. Hollidaysburg American Legion Ambulance Service*, 731 A.2d 169, 173-74 (Pa. Super. 1999) (interpreting requirements of ADA and its Pennsylvania equivalent). Here, Petitioner made no such assertion; indeed, she claimed the opposite – that she was totally disabled following the September 18, 2001 incident, and was unable to return to work in any capacity (Petition, 7, 10). Moreover, Petitioner never developed any argument under the ADA in the state court proceedings. She, at most, as in her present Petition, *referred* in passing to the ADA.

Because of these deficiencies, even if Petitioner somehow can be deemed to have *presented* a federal ADA claim in the state courts – she did not – she did not *adequately* present any such claim. Therefore, jurisdiction is lacking. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) ("It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.").

Although certain later decisions by this Court question whether the rule that a federal question not "pressed or passed on by" a state court will not be considered by this Court is jurisdictional or simply prudential, the result is the same – this Court will decline to consider any

(Continued on following page)

the Commonwealth Court nor the Supreme Court of Pennsylvania even considered, much less denied, any claim under the ADA.

Because Petitioner pursued only state law claims in the state courts, and because her present Petition presents no federal claim or question, this Court, respectfully, lacks jurisdiction to consider Petitioner's claims.

II. EVEN IF THIS COURT HAD JURISDICTION TO REVIEW PETITIONER'S PURELY STATE LAW CLAIMS, IT SHOULD DECLINE TO DO SO BECAUSE THE PETITION DOES NOT PRESENT ANY COMPELLING REASON(S) FOR GRANTING THE WRIT OF CERTIORARI.

Even assuming *arguendo* that this Court properly could assert jurisdiction over Petitioner's claims, it should decline to do so. *See Hammerstein v. Superior Court of California*, 341 U.S. 491, 492 (1951) ("The presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary."). It is clear that the Petition presents no "compelling reasons" for granting

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federal claim not clearly presented to and decided by the highest state court in which a decision may be had. *See Adams v. Roberston*, 520 U.S. 83, 86 (1997) (with "very rare exceptions, . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision that we have been asked to review") (internal quotations and citations omitted). *See also Illinois v. Gates*, 462 U.S. 213, 222 (1983) (whether "not pressed or passed upon below" rule is jurisdictional or prudential, result was the same – Court declined review of federal issue not fairly presented to state courts).

certiorari. Sup. Ct. R. 10. Indeed, Petitioner does not even attempt to argue that her Petition presents any compelling reasons for this Court's review. Rather, she merely seeks a review on the merits of the denial of her state law workers' compensation claim, which is a matter of concern only to the litigants, and presents no issues of public importance. Furthermore, as noted, Petitioner raises no federal claims or issues in her Petition, and the Pennsylvania courts decided no federal claims or issues. Under these circumstances, the Court should deny the Petition.

Supreme Court Rule 10 provides, in relevant part, that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons." Rule 10 further states, in relevant part, that such "compelling reasons" may be found to exist where:[3]

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. Furthermore, Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

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[3] Subsection (a) of Rule 10 concerns decisions by United States courts of appeals, and is therefore not relevant to this case.

Ms. Swan's Petition does not implicate any "compelling reasons" stated in Rule 10(b) for granting certiorari. Although the reasons cited in Rule 10 are not exclusive, this Court has held that it should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . " *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

Subsection (b) of Rule 10 does not support the grant of the Petition. Initially, there was no "decision" by the "state court of last resort" in this case, the Supreme Court of Pennsylvania. Rather, that court merely denied Petitioner's application for allowance of appeal from the decision of the intermediate Commonwealth Court. Thus, subsection (b) does not apply by its very terms.

Moreover, neither subsection (b) nor (c) of Supreme Court Rule 10 supports the grant of certiorari because no "important federal question" (indeed, *no* federal question *at all*) was decided by any Pennsylvania court in this case. The opinion of the Commonwealth Court (Petitioner's Supplemental Appendix) does not refer to, or decide, any federal issue and, as noted, the Pennsylvania Supreme Court declined to consider the case on its merits. *See Webb*, 451 U.S. at 495 (in reversing grant of certiorari, Court noted that "nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon").

Indeed, this is a paradigm case where a petitioner asserts that the error consists of "erroneous factual findings or the misapplication of a properly stated rule of law[,]" in which certiorari is "rarely" granted. Sup. Ct. R. 10. Ms. Swan does not even argue that her Petition seeks

review of issues of public importance. Certiorari is inappropriate where any decision by this Court would benefit only the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

Therefore, the Court should deny the Petition.

III. THE COURT SHOULD DENY CERTIORARI BECAUSE THE PENNSYLVANIA COURTS CORRECTLY AFFIRMED THE DENIAL OF PETITIONER'S STATE WORKERS' COMPENSATION CLAIM.

The Commonwealth Court of Pennsylvania, in a decision in which discretionary review was denied by the Supreme Court of Pennsylvania, correctly affirmed the decision of the workers' compensation judge and the Board denying Petitioner's claim for workers' compensation benefit. Because this decision was based on express credibility determinations and findings of fact, and because Petitioner has offered no reason to disturb those findings, the decision of the Pennsylvania courts should stand. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985) (Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts).

As the Commonwealth Court correctly noted, under Pennsylvania law, a workers' compensation claimant bears the burden of proving all the elements necessary to establish entitlement to an award of benefits. *Alberta A. Swan v. Workers' Compensation Appeal Bd. (Wal-Mart #2334 and A.I.G. Claim Services, Inc.)*, slip op., No. 584 C.D. 2005, at p. 7 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix). Where a claimant asserts a work-related mental

injury, the claimant must prove by objective evidence that the injury is not a subjective reaction to normal working conditions. *Davis v. Workmen's Compensation Appeal Bd. (Swarthmore Borough)*, 561 Pa. 462, 751 A.2d 168, 174 (2000). An honest, mistaken, perception of job harassment that aggravates a pre-existing anxiety or causes a psychological injury is not compensable under the Pennsylvania Workers' Compensation Act. *Hirschberg v. Workmen's Compensation Appeal Bd. (Dept. of Transp.)*, 81 Pa. Commw. 579, 474 A.2d 82 (1984).

Here, the workers' compensation judge rejected Petitioner's version of the events of September 18, 2001 and accepted the testimony of Wal-Mart's fact witnesses regarding the occurrences of that evening (Petitioner's Appendix D). The WCJ found that the Petitioner was not the victim of abnormal working conditions, but that her anxiety was the result of her misperception and overreaction to normal working conditions. Furthermore, the WCJ noted that Petitioner failed to present any medical evidence that she was disabled as a result of her anxiety. Finally, the WCJ accepted the testimony of Wal-Mart's medical expert with respect to his opinion that Petitioner suffered from histrionic personality disorder that predisposed her to excessive reactions to situations.

The Commonwealth accepted these findings, which it found were based on the WCJ's credibility determinations, and therefore affirmed the denial of Petitioner's workers' compensation claim. *Swan*, slip op. at 6, 8-9 (Petitioner's Supplemental Appendix). The Supreme Court of Pennsylvania, when confronted with arguments nearly identical to the ones presented in the petition, declined review (Petitioner's Appendix A and B).

Because Petitioner offers no reasons why these findings of fact on matters of state law, which were accepted as supported by the record at all levels of review, should be disturbed by this Court, certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondent Wal-Mart Stores Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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